

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ARTHUR ALAN WOLK,

Plaintiff,

v.

FLIGHT OPTIONS, INC,

Defendant.

:  
:  
:  
:  
:  
:  
:  
:  
:

No. 03-cv-06840

**MEMORANDUM**

**Green, S.J.**

**September 13, 2005**

Presently before the court are Plaintiff and Defendant's Motions for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the responses thereto. For the reasons set forth below, Plaintiff and Defendant's Motions for Summary Judgment will be denied in their entirety.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Arthur Alan Wolk, an attorney practicing aviation litigation, ("Wolk" or "Plaintiff"), and Flight Options, LLC, a Cleveland-based operator of fractional aircraft ownership programs, ("Flight Options" or "Defendant"), entered into a contract where Wolk would represent Flight Options in a litigation matter against nonparty GE Engine Services - Corporation, Inc., d/b/a Garrett Aviation Services, ("Garrett").

Flight Options and Wolk agreed that Wolk would work on a contingency fee basis. The contingency fee agreement contained the following provision:

Flight Options engages Arthur Alan Wolk as its attorney to prosecute a claim for property damage and associated consequential and/or punitive damages.

It agrees that the compensation of its attorney for services shall be:

Out of whatever sum is recovered, either by settlement or verdict, the attorney shall be entitled to One-Third (1/3), plus reimbursement of costs and expenses. Should no money be recovered by settlement or verdict, the attorney shall have no claim against it for services rendered

or costs expended....

Wolk is now suing Flight Options for breach of this contingency fee agreement. Plaintiff claims that although he represented Flight Options, he was never paid his contingency fee. Flight Options argues that Wolk is entitled to nothing because he stopped representing Flight Options prior to the settlement of the Garrett Litigation. Both parties have moved for summary judgment; both point to evidence which they claim support their disputed positions as to when the Garrett Litigation settled.

### **The Garrett Litigation**

In December 1999, Flight Options hired Garrett to do a pre-purchase inspection of a Dassault-Breguet Falcon 50 aircraft, ("Falcon"). Garrett conducted this inspection and certified the aircraft to be airworthy and suitable for purchase and fractional resale. Based on the results of Garrett's inspection, Defendant purchased the Falcon with the intent to resell it to an individual or company interested in fractional interests or "shares." Defendant then planned to operate and maintain the aircraft for the benefit of the new owner. However, Defendant subsequently discovered that the Falcon had a corrosion problem which prevented it from being resold. Flight Options then hired Wolk as counsel in anticipation of litigation against Garrett for its allegedly negligent inspection of the aircraft.

### **The Instant Litigation**

The disputed facts which give rise to this case are as follows: Wolk contends that the Garrett litigation matter reached a settlement in June 2003. Pursuant to the contingency agreement, Plaintiff claims that he is now entitled to one-third the amount of Defendant's final settlement with Garrett. Defendant, however, contends that what took place in June 2003 between it and Garrett was merely settlement negotiations and did not ripen into an actual settlement until June 2004. It is undisputed that Plaintiff ceased representing

Defendant in November 2003. Defendant now argues that under Pennsylvania law, an attorney who is terminated prior to a settlement is not entitled to receive his contingency fee but is limited to a quantum meruit claim. Since Wolk has not pleaded a quantum meruit claim, Defendant contends that Wolk's case should be dismissed.

Additionally, Flight Options raises two other defenses to Plaintiff's claims: (1) that the contingent fee agreement is unenforceable because it contains an invalid and nonseverable waiver of conflicts clause; and (2) the contingency fee agreement specifically states "should no money be recovered by settlement or verdict, the attorney shall have no claim against [Defendant] for services rendered or costs expended." Defendant contends that since it received no money as part of the settlement, Plaintiff is not entitled to his contingency fee.

On November 24, 2003, Wolk commenced this action in the Court of Common Pleas, Philadelphia County, Pennsylvania. In his complaint, Plaintiff claimed that Defendant breached the contingency fee agreement. Thereafter, Defendant removed this action to this court based on diversity of citizenship.

## **II. MOTIONS FOR SUMMARY JUDGMENT**

### **A. Legal Standard**

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2025 (1986).

A party seeking summary judgment bears the initial responsibility of identifying the basis for its motion, along with evidence clearly demonstrating the absence of a genuine

issue of material fact. See Celotex Corp. v. Catreet, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Rule 56(e) of the Federal Rules of Civil Procedure requires the nonmoving party to supply sufficient evidence, not mere allegations, for a reasonable jury to find in the non-movant's favor. See Oldson v. General Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996). This evidence must be viewed in the light most favorable to the nonmoving party. See Anderson, 477 U.S. at 256.

**B. Plaintiff and Defendant's summary judgment motion will both be denied**

**1. Flight Options and Garrett's settlement agreement**

Federal courts applying Pennsylvania law have held that a client must recover a settlement or prevail in a lawsuit during the contingency representation in order for the attorney to receive his contingency fee and not be limited to quantum meruit claim. See Novinger v. E.I. DuPont, 809 F.2d 212, 218 (3d Cir. 1987); Elliot Reihner Siedzikowski & Egan, P.C. v. The Pennsylvania Employees Benefit Trust Fund, 161 F. Supp.2d 413, 423, (E.D.Pa. 2001). Here, Wolk contends that he is owed his full fee under the contingency agreement. To support this claim, Wolk provides evidence that a contingency fee agreement existed between the parties and that Flight Options recovered benefits under the terms of the Garrett settlement agreement in June 2003. Specifically, he points to deposition testimony from Flight Options that states that Flight Options received a discount from Garrett in June 2003.

Since Wolk is the nonmoving party in Flight Options' motion, we will first consider the evidence in the light most favorable to Wolk. See Anderson, 477 U.S. at 248. Viewed in this light, the June 23, 2003 e-mail between Wolk and Flight Options which states that "you folks can knock out the exact language with the mediator" may support an inference that Flight Options and Garrett had essentially settled their litigation in June 2003. Wolk's rights under the

contingency fee agreement would have then vested. See Elliot, 161 F. Supp.2d at 423.

Accordingly, Flight Options' motion for summary judgment will be denied.

Second, in Wolk's motion, Flight Options is the nonmoving party. Therefore, the evidence must now be considered in the light most favorable to Flight Options. See id. Viewed in this light, Defendant's deposition testimony that the final settlement agreement in the Garrett litigation was signed in June 2004, is evidence that the Garrett litigation was not settled until June 2004. Since Wolk stopped representing Flight Options prior to this time, Wolk's rights under the contingency fee agreement would not have vested. See id. Assuming, arguendo, that Flight Options could prevail on this argument, the court would not be required to dismiss the complaint but only stay this matter until Wolk could amend his complaint by adding a quantum meruit claim.

## **2. The Conflict Waiver Clause**

Flight Options argues that the entire contingency fee is unenforceable because Wolk stated that he would only represent Flight Options if it agreed to waive any conflicts of interest that might arise if he were later asked to sue Flight Options on a separate claim by another entity. Defendant cites Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F. Supp. 910, 914 (E.D.Pa. 1981) in support of this argument. In Mattioni, the court cited a Pennsylvania Supreme Court decision which stated that a clause which required attorney consent to settle was against public policy. Here, however, Defendant has not cited any judicial decision that holds a waiver of conflicts clause is against public policy or renders a contract void.

Instead, Flight Options cites Pennsylvania Rules of Professional Conduct 1.7 which provides "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." However, the same rule provides that conflicts of interest can be waived.

See PA RPC 1.7(b)(4). Because Flight Options has not presented evidence of a concurrent conflict, the court should not determine this issue on summary judgment.

### **3. Interpretation of the contingency agreement**

A separate issue exists as to the interpretation of the contingency agreement. The disputed part of this provision states “[s]hould no money be recovered by settlement or verdict, the attorney shall have no claim against it for services rendered or costs expended....” Specifically, Defendant argues that since it received “in-kind services” instead of a cash payment in the July 2004 settlement contract, no money was recovered by settlement. As such, Defendant contends that under the terms of the contingency agreement, Wolk has no claim against it for services rendered. Plaintiff, however, disputes this and contends that Defendant did receive monetary payments from Garrett. To support his argument, Plaintiff points to the August 25, 2003 check made by Garrett to Flight Options and the TFE-731 engine agreement which requires Garrett to issue a check in the amount of \$15,000 for each MPI engine inspection and \$22,000 for each CZI engine inspection. Plaintiff also points to the section of the contingency fee which states “[o]ut of whatever sum is recovered, either by settlement or verdict, the attorney shall be entitled to One-Third (1/3), plus reimbursement of costs and expenses.” Plaintiff argues that the reference to sum includes all compensation. Accordingly, the issue is disputed and not right for decision on summary judgment.

The issue is essentially whether the acceptance of in-kind services or credit by Flight Options constitutes money under the terms of the contingency fee agreement. Here, a genuine issue of material fact exists as to the interpretation of the agreement. Viewed in the light most favorable to Plaintiff, the fee agreement can be read to provide for one-third the sum of the value of the settlement. Therefore, Defendant’s motion for summary judgment must be

denied. Since we cannot enter summary judgment at this time, this court will await the evidence produced at the trial stage.

**III. CONCLUSION**

For these reasons, Plaintiff and Defendant's Motions for Summary Judgment will be denied in their entirety.

**BY THE COURT:**

---

**CLIFFORD SCOTT GREEN**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ARTHUR ALAN WOLK,

Plaintiff,

v.

FLIGHT OPTIONS, INC.

Defendant.

:  
:  
:  
:  
:  
:  
:  
:

No. 03-cv-06840

**ORDER**

**AND NOW**, this 13<sup>th</sup> day of September 2005, the Motions of Plaintiff and Defendant for Summary Judgment **ARE ORDERED DENIED**.

**IT IS FURTHER ORDERED** that a final pre-trial conference is scheduled for September 26, 2005 at 2:30pm in Chambers.

**BY THE COURT:**

\_\_\_\_\_  
**CLIFFORD SCOTT GREEN**